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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-665

HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION,

Petitioner,

against

TRANSCONTINENTAL GAS PIPE LINE CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	8
I—The applicability of lawful and reasonable local land use plans and regulations to a project certificated by the F.P.C. under the Natural Gas Act is an important question of federal law which has not been, but should be, settled by this court.	8
II—The decision of the Court of Appeals for the Third Circuit is in conflict with the decision of another Court of Appeals with respect to the interpretation and application of the National Environmental Policy Act	11
CONCLUSION	14
APPENDIX:	
A—Opinion of the United States Court of Appeals for the Third Circuit	1a
B—Judgment	20a
C—Opinion on Motion for Summary Judgment of the United States District Court, District of New Jersey, May 7, 1971	22a

PAGE

D—Opinion of the United States District Court, District of New Jersey, September 14, 1971 28a

E—Judgment 36a

Cases Cited

Arlington Coalition on Transportation v. Volpe, 458 F. 2d 1323 (4th Cir. 1972) 13, 14

Calvert Cliffs Coordinating Committee, Inc., et al v. Atomic Energy Commission, 449 F. 2d 1109 (D. C. Cir. 1971) 11-14

Confederacion de la Raza Unida v. City of Morgan Hill, 324 F. Supp. 895 (N. D. Cal. 1971) 11

E. B. Elliott Advertising Co. v. Metropolitan Dade County, 425 F. 2d 1141 (5th Cir. 1970) 11

Environmental Defense Fund, Inc. v. Corps of Engineers of the U. S. Army, 324 F. Supp. 878 (D. D. C. 1971) 14

Environmental Defense Fund, Inc. v. Corps of Engineers of the U. S. Army, 325 F. Supp. 749 (E. D. Ark. 1971) 14

Environmental Defense Fund, Inc. v. Tennessee Valley Authority, 339 F. Supp. 806 (E. D. Tenn. 1972) 14

Mezitt v. Department of Public Utilities, 241 N. E. 2d 829 (Sup. Jud. Ct. Mass. 1968) 9, 10

Named Ind. Mem. of San Antonio Cons. Soc. v. Texas Highway Dept., 446 F. 2d 1013 (5th Cir. 1971) 13

National Helium v. Morton, 455 F. 2d 650 (10th Cir. 1971) 13

New York State Natural Gas Corp. v. Town of Elma, 182 F. Supp. 1 (W. D. N. Y. 1960) 8, 9

PAGE

St. Clair v. Colonial Pipeline Co., 235 Md. 578, 202 A. 2d 376 (Ct. App. Md. 1964) 9

Transcontinental Gas Pipe Line Corp. v. Borough of Milltown, 93 F. Supp. 287 (D. N. J. 1950) 9

Upper Pecos Association v. Stans, 452 F. 2d 1233 (10th Cir. 1971) 13

Statutes Cited

National Environmental Policy Act:

Sec. 102 ..... 12, 13

Sec. 102(2)(c) 4, 12, 13

Sec. 103 ..... 12, 13

Natural Gas Act:

Sec. 7(c) 3

N.J.S.A. 13:17-1 (Hackensack Meadowlands Reclamation and Development Act) 5

N.J.S.A. 13:17-9 5

15 U.S.C.:

Sec. 717 8

Sec. 717F(c) 3

Sec. 717w 8

28 U.S.C.:

Sec. 1254(1) 2

42 U.S.C.: PAGE

Secs. 4321-4347 11
Sec. 4332(2)(c) 4, 12
Sec. 4333 12

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, the Hackensack Meadowlands Development Commission (hereinafter the H.M.D.C.), respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered on August 2, 1972, affirming an Order of the United States District Court enjoining the Petitioner and its agents from preventing or interfering with the construction by Respondent Transcontinental Gas Pipe Line Corp. (hereinafter Transco) of a tank for

the storage of liquefied natural gas and appurtenant facilities.

Opinions Below

The opinion of the United States District Court for the District of New Jersey entered May 7, 1971, denying Petitioner's motion for summary judgment, is set forth in Appendix C hereinafter. This opinion is unreported. The opinion of the District Court entered September 14, 1971 is set forth in Appendix D hereinafter. The latter opinion is also unreported. The judgment of the District Court entered September 16, 1971 is set forth in Appendix E hereinafter. The opinion of the Court of Appeals for the Third Circuit is set forth in Appendix A hereinafter. This opinion has not yet been published in the Federal Reporter. The judgment of the Third Circuit is set forth in Appendix B hereinafter.

Jurisdiction

The judgment of the Court of Appeals was entered on August 2, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

I

Does the issuance of a certificate of public convenience and necessity by the Federal Power Commission for a natural gas storage facility preclude the enforcement of the lawful zoning master plan of a regional land-use planning and zoning authority established by a state when the regional zoning master plan designates the entire area

surrounding the proposed facility as a zone for higher residential use incompatible with the proposed industrial structure?

II

Will the federal courts enforce and treat as wholly valid, a certificate of public convenience and necessity issued by the Federal Power Commission in violation of clear and express provisions of the National Environmental Policy Act requiring the Federal Power Commission to consider affirmatively, on its own motion, all issues relevant to the environmental impact of a facility for which a certificate is sought?

Statutory Provisions Involved

Natural Gas Act §7(c) (15 U.S.C. §717F(c)).

> "(c) No natural-gas company or person which will be a natural gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: . . .
>
> • • •
>
> In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Com-

mission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly . . ."

National Environmental Policy Act §102(2)(c) (42 U.S. C. §4332(2)(c).

"The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

• • •

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes; . . ."

Statement of the Case

In January of 1968, pursuant to enactment by the Legislature of the State of New Jersey of the Hackensack Meadowlands Reclamation and Development Act (N.J.S.A. 13:17-1, *et seq.*), the H.M.D.C. was established with the power to adopt a master plan (N.J.S.A. 13:17-9) for the development of lands within the Hackensack Meadowlands District (hereinafter District). The area designated in the Act encompasses approximately 21,000 acres centrally situated in the heart of the New York-New Jersey metropolitan area found by the Legislature to be in great need of comprehensive regulation and planning. N.J.S.A. 13:17-1. In November of 1969 the H.M.D.C. promulgated its Stage I Master Plan and Interim Zoning Regulations; the Stage I Master Plan delineated certain portions of the District as Planning areas, the Interim Zoning Regulations providing that construction and development should be restricted until the adoption of the final stage of the Master Plan and accompanying final zoning regula-

tions. Respondent Transco, a natural gas company, owns a tract of land situated in the Borough of Carlstadt, New Jersey, across which run its natural gas transmission lines and upon which it maintains a facility for liquefying natural gas and a single storage tank for the liquefied gas (LNG). The Transco tract is located entirely within one of the designated Planning Areas.

In December of 1969, Transco filed an application with the Federal Power Commission (hereinafter FPC) seeking issuance of a certificate of public convenience and necessity by the FPC for construction of a second aboveground tank for the storage of LNG on the Carlstadt tract. While the application for the certificate of public convenience and necessity was pending before the FPC, Transco entered into discussions with various representatives of the H.M.D.C. during which information concerning the storage tank structure was made available to H. M.D.C. personnel.

As the proposed storage tank was not a permitted use under the Master Plan, the H.M.D.C. concluded that the structure would require authorization by issuance of a variance. After a public hearing on the proposal was held by the H.M.D.C., a variance was denied, the H.M. D.C. determining that the proposed structure would seriously restrict the range of future land uses in the surrounding Planning Area and would, in addition, constitute a substantial hazard to safety. Upon denying an unconditioned variance, the H.M.D.C. attempted to interest Transco in a compromise solution involving an approval of the structure conditioned upon its ultimate removal after a period of 10 years. Transco declined to accept this proposal, contending that its obligations under the Natural Gas Act prohibited such an agreement. The action of the H.M.D.C. denying the variance was taken July 9, 1970.

In the meantime, on March 12, 1970 the F.P.C.—acting upon Transco's application for a certificate of public convenience and necessity—issued a certificate for the proposed storage tank facility. The H.M.D.C. was not a party to this proceeding before the F.P.C. because it was never notified the application had been filed.

The proceedings between the H.M.D.C. and Transco having culminated in the denial of a variance for the structure by the H.M.D.C., Transco filed a suit on July 22, 1970 in the United States District Court seeking to enjoin the H.M.D.C. from interfering with construction of the proposed storage tank. The H.M.D.C. counterclaimed to enjoin construction, alleging in part that the F.P.C. had issued the certificate of public convenience and necessity without complying with the National Environmental Policy Act (NEPA). Federal jurisdiction was invoked under the Natural Gas Act and under NEPA. Subsequently, a motion for summary judgment on the counterclaim brought by the H.M.D.C. was denied (Opinion set forth in Appendix C hereinafter), and after plenary hearing the District Court entered judgment granting the injunctive relief sought by Transco (Opinion set forth in Appendix D hereinafter).

Upon appeal by the H.M.D.C. from the judgment of the District Court, the Court of Appeals for the Third Circuit affirmed the decision of the District Court (Opinion and Judgment of the Court of Appeals set forth in Appendicies A and B hereinafter). This Petition for a Writ of *Certiorari* to the Third Circuit is filed to obtain review of the final judgment of that Court.

REASONS FOR GRANTING THE WRIT

I

The applicability of lawful and reasonable local land use plans and regulations to a project certificated by the F.P.C. under the Natural Gas Act is an important question of federal law which has not been, but should be, settled by this court.

The few judicial precedents dealing with the question of the extent to which a local governmental authority can apply its lawful zoning enactments and regulations to the holder of a certificate of public convenience and necessity issued under the Natural Gas Act (15 U.S.C. §§717-717w) state that Congress, in enacting that statute, did not intend to remove facilities operated by entities regulated under it from local land use laws. For example, in one such case, a District Court said:

> "There is an indisputable local interest in controlling the environmental development of the community which is almost universally expressed in the power of local municipalities to enact zoning ordinances. It does not appear to have been the intention of Congress in enacting the Natural Gas Act to exempt gas suppliers from complying with such local zoning ordinances. Nor does the Commerce Clause of the Constitution operate to exempt interstate commerce from reasonable zoning regulation . . ." *New York State Natural Gas Corp.* v. *Town of Elma,* 182 F. Supp. 1, 6-7 (W. D. N. Y. 1960).

In the *Town of Elma* case, the District Court expressly limited its decision—which was adverse to the local gov-

ernmental unit—to the particular facts, stating that its decision did ". . . not foreclose reasonable future regulation of the site involved through the defendants' Zoning Ordinance and Building Code . . ." *New York State Natural Gas Corp.* v. *Town of Elma, supra* at 7. Another earlier District Court case, cited and apparently relied upon by the trial court below, involved a pipe line running wholly underground which the court found to lack any element whatsoever of inconvenience or aesthetic detriment to the surrounding area. *Transcontinental Gas Pipe Line Corp.* v. *Borough of Milltown*, 93 F. Supp. 287, 294-295 (D. N. J. 1950). More recent cases arising in State Courts indicate that local authorities, influenced no doubt by public concern over land use planning and the environment, are asserting increased regulatory power over storage facilities appurtenant to interstate transmission pipe lines. *Mezitt* v. *Department of Public Utilites*, 241 N. E. 2d 829 (Sup. Jud. Ct. Mass. 1968); *St. Clair* v. *Colonial Pipeline Co.*, 235 Md. 578, 202 A. 2d 376 (Ct. App. Md. 1964). For example, *Mezitt* indicates that the State of Massachusetts has a statutory scheme under which the possessor of a certificate of public convenience and necessity issued by the F.P.C. *may*, at the discretion of the State Department of Public Utilities, receive an order from that Department exempting the certificated facility from local zoning laws, provided that the State Department of Public Utilities approves such an exemption and provided further that regulatory conditions and restrictions imposed by the State upon the certificated facility are met by the operator of that facility. In the *Mezitt* case, numerous regulatory conditions and restrictions relating to construction of a subterranean liquefied natural gas storage facility proposed by Tennessee Gas Transmission Co.—and certificated by the F.P.C.—were imposed by

the Massachusetts Department of Public Utilites as conditions attached to the zoning waiver. *Mezitt* v. *Department, etc., supra* at 832-834.

Thus, although it can be concluded from the few decisions that have involved a conflict between local government exercise of the police power and the activities of a natural gas company certificated by the F.P.C. that the Natural Gas Act does not completely preempt or preclude local regulations, the existing precedents leave substantially unsettled questions as to what extent and in what degree local governmental authorities are empowered to exercise their authority over activities certificated under the Natural Gas Act. Moreover, there has surprisingly never been a decision of this Court confronting this issue. Such a decision, elucidating some clear principles and parameters establishing and defining the latitude enjoyed by a local government, confronted by a proposed certificated plant or structure, to regulate, control or restrict such a proposal, is sorely needed.

The H.M.D.C. has a vital interest in securing a clearer definition and delineation by this Court of the permissible degree of regulation and restriction that can be imposed by local government upon F.P.C.-certificated plants. As concern for land-use planning grows, and the ambitiousness and sophistication of local and regional governmental land-use planning efforts increases, this type of conflict can be expected to arise more often than it has in the past. For, even if it be so that the H.M.D.C. cannot absolutely prevent the imposition of the storage tank facility at issue in the instant case, nor even prevent construction of additional certificated facilities of similar purpose in the future, there is surely some degree—some quantum—of regulation and restriction which it can impose to the

end that the extreme incompatibility of the Transco plant with the land uses specified by the Master Plan of the H.M.D.C. can be, through proper site-planning and aesthetic measures, at least minimized. Unfortunately, the question of just what latitude the H.M.D.C. and other local or regional zoning authorities possess is left unanswered, not only by the decision of the Third Circuit below, but also by the entire existing body of case law concerning the subject. Particularly in view of the fact that federal courts are increasingly cognizant of the public benefits which arise from effective land-use regulation (see *E. B. Elliott Advertising Co.* v. *Metropolitan Dade County,* 425 F. 2d 1141 (5th Cir. 1970); *Confederacion de la Raza Unida* v. *City of Morgan Hill,* 324 F. Supp. 895 (N. D. Cal. 1971)), it is clear that there should be a resolution of this crucial question by the Court.

II

The decision of the Court of Appeals for the Third Circuit is in conflict with the decision of another Court of Appeals with respect to the interpretation and application of the National Environmental Policy Act.

The Court of Appeals for the District of Columbia Circuit, in one of the early Court of Appeals decisions construing the National Environmental Policy Act of 1969 (42 U.S.C. §§4321-4347) (NEPA), held that the procedural requirements of NEPA are applicable to Federal agency decisions taken at any time subsequent to the effective date of NEPA, that date being January 1, 1970. *Calvert Cliffs Coordinating Committee, Inc. et al* v. *Atomic Energy Commission,* 449 F. 2d 1109 (D. C. Cir. 1971). In *Calvert Cliffs,* the Court of Appeals stated:

> "Every federal court having faced the issues has held that the procedural requirements of NEPA must be met in order to uphold federal action taken after January 1, 1970."
>
> • • •
>
> In some cases, the courts have had a difficult time determining whether particular federal actions were 'taken' before or after January 1, 1970. But they have all started from the basic rule that any action taken after that date must comply with NEPA's procedural requirements." *Calvert Cliffs Coordinating Committee, Inc., et al* v. *Atomic Energy Commission, supra* at 1120.

Significantly, that court further observed that the procedural requirements of Section 102(2)(c) of NEPA (42 U.S.C. §4332(2)(c)) ". . . are not inherently flexible," and that neither Section 103 of NEPA (42 U.S.C. §4333)—dealing with statutory or administrative provisions of an agency existing upon NEPA's effective date which would *bar* compliance with NEPA procedural duties—nor the language of Section 102 stating that the procedural duties of that Section must be fulfilled to the "fullest extent possible" allow delay beyond the effective date of NEPA in any situation except one in which the Federal agency can point to "an insuperable barrier" to procedural Section 102(2)(c) compliance embodied in one of its controlling statutes or existing administrative regulations. *Calvert Cliffs Coordinating Committee, Inc., et al* v. *Atomic Energy Commission, supra* at 1120. In the instant case, the F.P.C.—which participated as *Amicus curiae* at all stages below—did not at any time suggest or show that either the Natural Gas Act or its pre-existing regulations precluded its preparation of the environmental

impact statement required by Section 102(2)(c) on the date of March 12, 1970—the date on which it certificated the Transco storage tank plant. Rather, the primary contention of the F.P.C. was that the claim of non-compliance with Section 102(2)(c) should not be considered by the trial court because it was a "collateral attack" upon the agency's certification order.*

In short, the holding of the Third Circuit that Section 103 of NEPA sanctions a "flexible approach" to the procedural duties imposed upon a Federal agency by Section 102(2)(c) of NEPA stands in marked contrast, and in clear conflict with, the interpretation of those sections established by *Calvert Cliffs.* Further, there is no hint whatsoever in the *Calvert Cliffs* opinion—or in any of the legion decisions of other Federal courts interpreting NEPA—that the fact that an action was taken prior to the promulgation of NEPA compliance guidelines by the Council on Environmental Quality has any exculpatory effect insofar as failure to adhere to Section 102 procedural requirements is concerned. Indeed, numerous judicial precedents hold Section 102 duties obligatory at all points of administrative action or decision taken subsequent to January 1, 1970. *Named Ind. Mem. of San Antonio Cons. Soc.* v. *Texas Highway Dept.,* 446 F. 2d 1013, 1025 (5th Cir. 1971); *Upper Pecos Association* v. *Stans,* 452 F. 2d 1233, 1236 (10th Cir. 1971); *National Helium* v. *Morton,* 455 F. 2d 650, 656 (10th Cir. 1971); *Arlington Coalition on Transportation* v. *Volpe,* 458 F. 2d 1323, 1331 (4th Cir.

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* It seems clear that neither the trial court nor the Court of Appeals regarded that contention as persuasive, for both courts considered the NEPA issue on its merits, despite adopting an interpretation of NEPA that conflicts with the interpretation established by the *Calvert Cliffs* decision of the District of Columbia Circuit.

1972). See also, *Environmental Defense Fund, Inc.* v. *Corps of Engineers of the U. S. Army*, 324 F. Supp. 878 (D. D. C. 1971); *Environmental Defense Fund, Inc.* v. *Corps of Engineers of the U. S. Army*, 325 F. Supp. 749 (E. D. Ark. 1971); *Environmental Defense Fund, Inc.* v. *Tennessee Valley Authority*, 339 F. Supp. 806 (E. D. Tenn. 1972).

There is, then, a genuine conflict between the decision of the Third Circuit in the case at bar and earlier decisions interpreting NEPA reached by other Courts of Appeal, the most notable conflict being between the decision below and the case of *Calvert Cliffs Coordinating Committee, Inc., et al.* v. *Atomic Energy Commission, supra*. Petitioner submits that the decision of the Third Circuit below is in error to the extent that it departs from and conflicts with the interpretation of NEPA established by *Calvert Cliffs*. This Court should grant the Writ sought and review the decision below to correct the erroneous interpretation adopted by the Court of Appeals and resolve the conflict.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of *Certiorari* should be granted.

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APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

(Filed—August 2, 1972.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-2064

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, a corporation of the State of Delaware,

Appellee,

PUBLIC SERVICE ELECTRIC & GAS COMPANY and SOUTH JERSEY GAS COMPANY,

v.

HACKENSACK MEADOWLANDS DELELOPMENT COMMISSION, a public corporate body of the State of New Jersey, and CLAYSON W. FOLEY, and THE BOROUGH OF CARLSTADT, a municipal corporation in the County of Bergen, State of New Jersey, and BERNARD MAGGIO

HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION and CLAYSON W. FOLEY,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Appendix A

Argued April 21, 1972

Before ADAMS, ROSENN and HUNTER, *Circuit Judges*
HUNTER, *Circuit Judge:*

In this appeal, we are faced with the question of the extent to which a state may legitimately interfere with interstate commerce through the exercise of its police powers. In apparent conflict are the State of New Jersey's plans for the controlled development of its "Meadowlands District" and the right of a federally certificated natural gas company to expand its storage facilities on land acquired by it approximately five years before the enactment of the Hackensack Meadowlands Reclamation & Development Act, N.J.S.A. 13:17-1, *et seq.*

I

Transcontinental Gas Pipeline Corporation ("Transco"), the appellee, is a natural gas company within the meaning of the Natural Gas Act ("Act"), 15 U.S.C. §717 *et seq.*,[1] and is thereby vested with various rights and powers as well as concommitant duties and obligations. Pursuant to authorization by the Act and the resulting periodic issuance of Certificate of Public Convenience and Necessity[2] by the Federal Power Commission ("FPC"), Transco has constructed and presently maintains an extensive pipeline

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[1] 15 U.S.C. §717(a)(6) defines a "natural gas company" as an entity engaged in "the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."

[2] See 15 U.S.C. §717(f).

system which gathers natural gas from onshore and offshore Gulf Coast locations, transports the gas through interstate commerce, and subsequently sells it to various distributors along the East Coast. Approximately seventy-five percent of the total amount of natural gas used in the state of New Jersey is supplied by Transco.

In 1963 Transco purchased from the New Jersey Borough of Carlstadt a five hundred acre tract of barren and undeveloped meadowlands for the purpose of constructing facilties for the processing and storage of Liquefied Natural Gas ("LNG"). Subsequently the company acquired from the state, in return for settlement of pending litigation, any interests the state might have under disputed title.[3] After the FPC issued the necessary certificates, Transco constructed an LNG plant including an underground storage container. Soon after completion, however, engineering studies determined that the container, as constructed, would be unable to accommodate the full quantity of LNG for which it had been designed. In July of 1968, FPC issued an amended certificate, authorizing the construction of an above-ground cylindrical storage container. The plant—including the above-ground container and appurtenant liquification and vaporization facilities—is presently in full operation.

In January of 1968, pursuant to the enactment of the Hackensack Meadowlands Reclamation and Development Act,[4] the Hackensack Meadowlands Development Commis-

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[3] See *Transcontinental Gas Pipeline Corp.* v. *Department of Conservation,* 43 N. J. 135, 202 A. 2d 849 (1964). Transco's pipelines have run through the meadlowlands since 1950.

[4] N.J.S.A. 13:17-1 *et seq.*

sion ("Commission"), an autonomous, regional agency was established with the power to "adopt a master plan . . . for the physical development of all lands lying within the [Hackensack Meadowlands] District. . . ."[5] As stated in the Act, the area encompasses approximately 21,000 acres of saltwater swamps, meadows and marshes commonly known as "meadowlands" located in the lower Hackensack River Basin.[6]

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[5] N.J.S.A. 13:17-9.

See also N.J.S.A. 13:17-11:

> "The master plan shall include provisions or criteria for the location and use of buildings, structures, facilities, and land for solid waste disposal, and may include provisions for: (1) the use of land and buildings, residential, commercial, industrial, mining, agricultural, park and other like purposes; (2) service-water supply, utilities, sewerage, and other like matters; (3) transportation, streets, parking, public transit lines, and stations both above and below ground level, freight facilities, airports, harbors, channels, docks and wharves, and other like matters; (4) housing, residential standards; clearance, redevelopment, rehabilitation, conservation, and other like matters; (5) water, forest, soil conservation, flood control, and other like matters; (6) public and semipublic facilities including but not limited to civil centers, schools, libraries, parks, playgrounds, fire houses, police buildings, hospitals, and other like matters; (7) the distribution and density of population; (8) planned unit development; (9) community appearance; (10) financing and programming capital improvements; (11) and other related elements of growth and development, including the social implications of any proposed development, and advances in technology related to any subject included in the plan."

[6] N.J.S.A. 13:17-1. Of these 21,000 acres 18,000 are within the Commission's jurisdiction and apparently 10,000 acres have been deemed by the Commission to be "sufficiently undeveloped" for zoning and planning purposes.

Appendix A

The Transco property is located within one of the Commission's "Planning Areas," the company's existing facilities utilizing approximately sixteen acres of its five hundred acre tract.

In the fall of 1969, Transco was notified by its customers that additional LNG service would hence be required, especially during the peak winter season periods. To meet these demands, Transco applied to the FPC for authorization to construct a second above-ground storage facility. The construction would encompass an additional seven acres of the Transco property. As required by law, public notice of the application was published by the FPC and special notice given to the Governor and Public Service Commission of New Jersey. Neither the State, nor the Public Service Commission, nor the Commission petitioned to intervene or participate in any manner in the proceedings before the FPC although a number of Transco's customers were granted permission to intervene in support of the application. After a hearing the certificate was issued on March 12, 1970.

The Hackensack Meadowlands Reclamation and Development Act provides that a building permit must be obtained from the Commission prior to the commencement of any construction on land covered by the Commission's Master Plan.[7] After numerous meetings with Transco representatives, the Commission refused to issue the necessary permit, ostensibly on the grounds that the construction and operation of the proposed storage facility was not a "permitted use" under the Master Plan. The commission concluded that to allow the proposed construction

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[7] N.J.S.A. 13:17-12

a variance would have to be issued. However, that, too, was denied, the Commission concluding that the construction would "seriously restrict the range of possible uses in the surrounding areas" and that it would "fail to meet applicable planning and safety regulations."[8] Nevertheless, after further negotiations, the Commission offered to "reconsider" its position upon the condition that Transco, *inter alia*, agree to abandon the entire plant by 1980.[9]

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[8] The FPC certificate was issued to Transco prior to the adoption by the Commission of those portions of the Master Plan which prohibit the construction of the proposed facility.

[9] The Commission's resolution reads in relevant part as follows:

> "The consensus of the special committee studying the Transcontinental proposal for the construction of a second above-ground facility, concurred in by a majority of the members at a formal meeting held on Wednesday, June 10, was that the Commission would instruct its staff to approve the variance and building permit of Transcontinental, after the public hearing on the variance, provided the company enter into a written agreement containing the following:
>
> "...
>
> "II. A covenant, acceptable in form to both the Company and the Commission, which will require and guarantee the removal of existing above ground gas storage facility and the proposed one, and all ancillary equipment and structures thereto within 10 years of the date of execution. The forms and provisions of the covenant to be agreed upon by both parties prior to the approval of the variance and the covenant to be filed at the same time as the building is approved.
>
> "III. The execution of a performance bond for the removal of both above ground facilities and all ancillary equipment and structures thereto at the lapse of 10 years."

Transco refused, contending that its obligations under the Natural Gas Act prohibited such an agreement.[10]

On July 22, 1970, Transco filed suit in the District Court to enjoin the Commission from interfering with construction of the facility. The Commission counterclaimed to enjoin commencement of construction. After six days of hearings, the District Court permanently restrained the Commission from interfering with the construction of the facility.[11] The Commission appeals and we affirm.[12]

II

It is well established that the interstate transmission and sale of natural gas is within the regulatory ambit of the Commerce Clause of the Constitution. *Commonwealth of Pennsylvania* v. *State of West Virginia*, 262 U.S. 253

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[10] 15 U.S.C. §717f(b) states: "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

[11] An injunction was also entered directing the Borough of Carlstadt, defendants in the District Court, to issue the necessary building permits.

[12] The FPC was granted leave to appear as *amicus curiae* in the proceedings below. Its motion to present brief and oral argument to this Court was also granted and we are appreciative of counsel's presentation.

(1950); *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575 (1942). Although the states are not precluded from imposing reasonable restraints and restrictions on interstate commerce, and although the authority to enact zoning ordinances under the state's police power is clear, *see, e.g., Village of Euclid Ohio* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), it is equally settled that a state may not exercise that police power where the necessary effect would be to place a substantial burden on interstate commerce. *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945).[13] We must therefore look to the particular facts presented by this case to determine whether the Commission's complete interdiction[14] of the proposed facility was a reasonable exercise of its police powers, or as the District Court determined, an "arbitrary, unreasonable and unjustifiable interference" with interstate commerce.

The Commission initially contends that the District Court's decision must be reversed for its alleged failure

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[13] In *Southern Pacific, supra,* the Supreme Court stated:

> "The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation *is not to be avoided by 'simply invoking the* convenient apologetics of the police power.'" 325 U. S. at 779, citing *Kansas City Southern R. Co.* v. *Kaw Valley District*, 233 U. S. 75, 79 (1914) (emphasis added).

[14] It is important to emphasize that the Commission is not attempting to require the Transco facility to conform to any specific regulation. Rather it is attempting to prohibit construction altogether.

to consider adequately the "substantial public benefit" which will accrue to the Meadowlands area by the implementation of the Commission's Master Plan. Specifically, the argument is advanced that in determining whether or not an undue burden has been imposed upon interstate commerce, the District Court did not weigh sufficiently the reasons for the Commission's action. According to appellant, that action was adequately justified by the inherent benefits forthcoming to the area through strict adherence to the Master Plan. Our reading of the record, however, convinces us that the Commission's testimony was taken into consideration and, as indicated in the District Court's opinion, its viewpoint was, in fact, seriously weighed.

III

The Commission argues that land surrounding the Tansco site "has characteristics which will permit the establishment of higher uses than the heavy industrial character to which the proposed LNG facility would commit to the area" and that these planning goals are themselves a sufficient justification for the Commission's interference with interstate commerce. At the hearings and in its briefs to this Court, the Commission stated that these *contemplated* "higher uses" include the construction of a balanced residential community for 60,000 inhabitants in close proximity to the Transco site. However, the record reveals that if residential communities are in fact being considered, those plans are in the earliest stages of development and apparently thirty years in the future. In fact, it would appear that the only reasonably definitive plans for the development of the land surrounding the

Transco site are—as counsel for Transco has contended without contradiction—the construction of a 750 acre sports complex consisting of two stadia, a race track, and various adjacent parking facilities. New Jersey Sports and Exposition Authority Law, N.J.S.A. 5:10-1 *et seq.; see also New Jersey Sports & Exposition Authority* v. *McCrane,* No. A-97 (N.J. Sup. Ct., May 12, 1972), *digested at* 95 N.J.L.J. 526 (1972).[15] The Sports Authority and the Commission apparently have joint responsibilities over this 750-acre tract.[16]

Counsel for appellant conceded at oral argument that the Commission's opposition was not directed solely at this proposed facility. Rather, he candidly admitted that appellant was primarily distressed by the prospect of further construction on the Transco property in the future and the Commission's inability to restrict such FPC-certificated construction. Notwithstanding these concerns, we affirm the District Court's conclusion that the Commis-

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[15] The New Jersey Sports and Exposition Law declares in Section 2 "that the general welfare, health and prosperity of the people of the State will be promoted by the holding of athletic contests, horse racing and other spectator sporting events and of trade shows and other expositions in the State; that in order to induce professional athletic teams, particularly major league football and baseball teams, to locate their franchises in the State, it is necessary to provide stadiums and related facilities for the use of such teams, in addition to the facilities for horse racing and other spectator sporting events; that such stadiums and other facilities would also accommodate other events and serve other uses which would provide needed recreation, forums and expositions for the public." N.J.S.A. 5:10-2.

[16] The site was presumably chosen with the Commission's approval, as the Sports Authority Law requires.

sion's actions were an unlawful interference with interstate commerce. Although we are cognizant of the tremendous importance of sound community and regional planning, *see, e.g., E. B. Elliot Advertising Co.* v. *Metropolitan Dade County,* 425 F.2d 1141 (5th Cir. 1970), we must also consider the needs of the New York-New Jersey metropolitan area for the adequate and efficient supply and delivery of natural gas. Upon this record and with full consideration of the state's interest in the Meadowland District, we conclude that the District Court's determination characterizing the Commission's action as "arbitrary," and an "unwarranted imposition upon interstate commerce" was correct.

IV

The record reveals that the Commission had not promulgated any set of regulations, standards or criteria applicable to the construction of this type of industrial facility. It nevertheless concluded that the denial of the variance was "based mainly on the lack of conformity with applicable planning regulations and safety considerations."[17]

In the District Court extensive documentary evidence as well as testimony was presented by Transco, attesting to the safety of the proposed storage container. The Court found as a fact that the relevant Transco plans "con-

[17] The District Court determined that the burden which the Commission placed upon Transco to convince the Commission that the property was safe without having set forth reasonable and specific standards "was quite unreasonable in view of the potential conflict with a federally regulated business." We agree.

formed to all current building and safety standards." The Commission, however, does not accept this finding, asserts that it is against the weight of the evidence and argues that the District Court should be reversed.

Our standard of review is carefully circumscribed. On appeal, the District Court's findings of fact will not be set unless they are "clearly erroneous." F.R. Civ. P., Rule 52(a) *Andrews* v. *Chemical Carriers, Inc.*, 457 F.2d 636 (3d Cir. 1972); *Petition of M & J Tracey Inc.*, 422 F.2d 929, 931 (3d Cir. 1969).[18] After careful consideration, we conclude that none of the pertinent findings of the District Court are "clearly erroneous."

The testimony presented by Transco included that of Dale Hauser, the engineer in charge of the construction of the facility, who in considerable detail testified to the effect that the container met all existing safety regulations including those of the National Fire Protection Association and the American Petroleum Institution. It was uncontroverted that the specifications for the proposed facility not only complied with all existing safety standards relevant to the construction of such a facility but in fact included additional safety features suggested by Transco and the contractor—Pittsburgh-Des Moines Steel Company. In addition, William M. Nix, an engineer employed with an independent consulting firm, testified that the plans and specifications were "standard for the industry," included all safety factors and devices recognized

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[18] "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Company*, 333 U. S. 364, 394-95 (1948).

and used in the industry, met the safety codes of all regulatory authorities and were in accordance with good engineering practices.

The Commission, however, contends that its expert witness, Marvin Salzenstein, presented testimony concerning the "possibility" of gas dispersion from the container, that this testimony was not refuted by Transco and that the District Court was therefore "entirely unjustified" in concluding that the Transco had in fact adequately rebutted Salzenstein's "damaging" testimony. The weight to be given expert testimony is in the province of the trial judge and will not be set aside, unless the "clearly erroneous" standard is met. *United States ex rel. Carter Nelson, Inc.* v. *Campbell,* 293 F.2d 816 (9th Cir. 1961); *Evans* v. *United States,* 319 F.2d 751 (1st Cir. 1963). We conclude that credible testimony of the Transco witnesses adequately rebutted the Salzenstein testimony and we therefore will not disturb the Court's findings on this point.[19]

To conclude, not only are the District Court's findings of fact not "clearly erroneous" but our review of the record mandates the conclusion that they are correct.[20]

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[19] Appellant also attacks a reference in the District Court's opinion to what allegedly occurred at the administrative proceedings before the Commission. The Court's remarks were, however, at most parenthetical and this issue is of no import at this point.

[20] Since we have concluded that the District Court's findings on the safety issue are supported by the record and since the Commission had no applicable criteria of its own, we need not discuss the issue of federal preemption. See generally the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. §1671 *et seq., Florida Lime & Avocado Growers Inc.* v. *Paul,* 373 U. S. 132 (1963); *Northern States Power Company* v. *State of Minnesota,* 404 U. S. 1056 (1972); 1968 U. S. Code Cong. & Adm. News 3241.

Appendix A

V

The National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §4331 *et seq.*, mandates that all executive and administrative agencies give good faith, careful and informed consideration to environmental values during the course of their decision making processes. *See, e.g., Pennsylvania Environmental Council* v. *Bartlett*, 454 F.2d 613 (3d Cir. 1971); *Calvert Cliffs Coordinating Committee* v. *Atomic Energy Commission*, 449 F. 2d 1109 (D.C. Cir. 1971).[21]

Section 102, 42 U.S.C. §4332, contains the procedural provisions of NEPA. Of particular import to the present action is Subsection (C) which requires that to "the fullest extent possible" all federal agencies shall include a detailed environmental impact statement in "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment . . . ."[22]

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[21] For a comprehensive discussion of the background and scope of NEPA, see *Calvert Cliffs, supra.*

[22] Section 102 reads as follows:

> "The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
>
> (A) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and and the environmental design arts in

(Footnote continued on following page)

Appendix A

(Footnote continued from preceding page)

planning and in decision making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of Title 5, and shall accompany the proposal through the existing agency review processes;

(Footnote continued on following page)

Appendix A

This Court has held that NEPA should not be given retroactive application. *Pennsylvania Environmental Council* v. *Bartlett, supra; Concerned Citizens of Marlboro* v. *Volpe,* No. 72-1012 (3d Cir., Apr. 28, 1972). We have not as yet been called upon, however, to decide whether strict compliance with NEPA is mandated immediately as of January 1, 1970, when NEPA first became effective. We conclude that in the particular circumstances of this case, the FPC was not required to file a Section 102 impact statement.

Section 4333 directs all Federal agencies to:

> "review their present statutory authority, administrative regulations, and current policies and proced-

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(Footnote continued from preceding page)

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by subchapter II of this chapter."

ures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter."

The facts of this case demonstrate clearly why a flexible approach to NEPA should be taken. It is undisputed that Transco submitted its application for certification in December of 1969, that the stated "effective date" of NEPA was January 1, 1970 and that the FPC certificate was issued on March 12, 1970. Neither the FPC nor the Council on Environmental Quality ("CEQ") had as yet promulgated any guidelines whatsoever, the CEQ's Interim Guidelines only being issued on April 23, 1970, 35 Fed. Reg. 7390. The FPC's guidelines were issued on December 4, 1970. 35 Fed. Reg. 18958.[23] Thus, in January and February of 1970, it was questionable whether the granting of a certificate or other entitlement for use was even an "action" within the meaning of Section 102(c), much less a "*major* federal action." It was not until the publica-

[23] The FPC regulations have been amended several times and are now contained in 36 Fed. Reg. 22738 (Nov. 9, 1971). The regulations provide in essence that an application for a certificate pursuant to Section 7(c) of the Act must submit with the application "a detailed statement of the [five] environmental factors." This procedure is followed in lieu of an independent FPC inquiry and impact statement and has been held inadequate by the 2nd Circuit. *Green County Planning Board* v. *F.P.C.*, No. 71-1991 (2nd Cir. Jan. 17, 1972). There the Court held that the statement must be prepared by the F.P.C.'s staff and not the appellant.

tion of the CEQ Interim Guidelines on April 30, 1970—a month after the certificate was issued—that the former question was resolved.[24] Whether a project is a "major federal action" is, of course, a question which can only be resolved though a careful case-by-case analysis. Taking into consideration the facts that the Transco LNG facility had been in operation for a considerable period, that this was an expansion of an existing facility, that there was no expenditure of any federal funds, and that there was no taking of any public lands, it is quite reasonable for the FPC to have concluded—in the absence of any indication to the contrary—that this was not the sort of federal "action" that required a Section 102 impact statement. It is important to note that the approval of the construction of the facility in question is certainly not the type of "action" which most reasonable men would conclude, with-

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[24] 35 Fed. Reg. 7390 (April 30, 1970) read in relevant part:

> "*Actions included.* The following criteria will be employed by agencies in deciding whether a proposed action requires the preparation of an environmental statement:
>
> (a) 'Actions' include but are not limited to:
>
> (i) Recommendations or reports relating to legislation and appropriations;
>
> (ii) Projects and continuing activities:
>
> —Directly undertaken by Federal agencies;
>
> —Supported in whole or in part through Federal contracts, grants, subsidies, loans, or other forms of funding assistance;
>
> —Involving a Federal lease, permit, license, certificate or other entitlement for use;
>
> (iii) Policy—and procedure-making."

out any guidelines, to be either "major" or even an "action." *Cf. Calvert Cliffs, supra.* We therefore conclude that the failure of the FPC to prepare an impact statement does not invalidate the issuance of the certificate.

The order of the District Court will be affirmed.

To the Clerk:

Please file the foregoing opinion.

James Hunter, III
James Hunter, III, *Circuit Judge*

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-2064

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, a corporation of the State of Delaware

PUBLIC SERVICE ELECTRIC & GAS COMPANY, and SOUTH JERSEY GAS COMPANY, (Plaintiff Intervenors)

vs.

HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION, a public corporate body of the State of New Jersey, and CLAYSON W. FOLEY, and THE BOROUGH OF CARLSTADT, a municipal corporation in the County of Bergen, State of New Jersey, and BERNARD MAGGIO

Hackensack Meadowlands Development Commission and Clayson W. Foley,

Appellants

(D. C. Civil Action No. 980-70)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Appendix B

Present:

ADAMS, ROSENN and HUNTER, Circuit Judges

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed September 16, 1971, be, and the same is hereby affirmed, with costs taxed against appellants.

ATTEST:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

August 2, 1972

APPENDIX C

Opinion on Motion for Summary Judgment of the United States District Court, District of New Jersey, May 7, 1971

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION No. 980-70

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, a corporation of the State of Delaware,

Plaintiff,

v.

HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION, a public corporate body of the State of New Jersey, and CLAYSON W. FOLEY and THE BOROUGH OF CARLSTADT, a municipal corporation in the County of Bergen, State of New Jersey, and BERNARD MAGGIO,

Defendants.

WHIPPLE, District Judge:

In the original complaint in this action Transcontinental Gas Pipe Line Corporation (Transco) seeks to enjoin the Hackensack Meadowlands Development Commission (HMDC) and other local authorities from interfering with the construction and operation by Transco of interstate natural

gas pipeline facilities which have been authorized by the Federal Power Commission (FPC) pursuant to the Natural Gas Act, 15 U.S.C. § 717 et seq. Specifically, Transco obtained a certificate of public convenience and necessity from the FPC to construct an above ground container for the storage of liquefied natural gas (LNG) in Carlstadt, New Jersey. Such tank, if constructed, would become part of an existing facility of plaintiff, which includes an underground tank, an above ground tank similar to the proposed tank, an appurtenant liquefaction and vaporization facilities on a 400 acre tract owned by Transco, situated along the beautiful shores of the Hackensack River.

The HMDC was established pursuant to the Hackensack Meadowlands Reclamation and Development Act (N. J. Laws 1968, Chapter 404) (Act), approved January 13, 1969. The Act directs HMDC to prepare a master plan for the development of the Hackensack Meadowland District (District), delineated in the Act, within which the existing and proposed Transco facilities are located. On May 1, 1970 Stage I of the Master Plan and Interim Zoning Regulations became effective. Transco's property is included in a "Planning Area" where, according to the Interim Zoning Regulations, Article 6, Section 6-602, the proposed storage tank is not a permitted use. The Act further provides that no building can be constructed within this area unless a permit is issued by the HMDC.

Transco obtained its certificate of public convenience and necessity from the FPC on March 12, 1970 and on March 16, 1970 submitted information about the proposed tank to HMDC. After a conference had been held and additional papers received the HMDC concluded that since the tank was not a permitted use in this area, only a vari-

ance in the zoning regulations would allow construction. A hearing was held on January 18, 1970 and shortly thereafter the HMDC adopted an order denying Transco's application for a variance.

Transco subsequently filed the present complaint seeking an injunction, directing the HMDC to issue to Transco any permits necessary for the tank's construction. Transco asserts that its right to construct the LNG facilities stems from the certificate issued by the FPC. HMDC, by way of answer and through this motion, challenges the validity of that certificate because it was not issued in compliance with the National Environmental Policy Act of 1969 (NEPA). 42 U.S.C. § 4321, et seq.

The NEPA became effective on January 1, 1970 and as the Deputy Attorney General has suggested, it does indeed reflect the Congressional awareness of the impact man's activities have on the environment and the growing threat to our society by continuing the unplanned and unregulated development of our resources. In order to give this policy meaning Section 102 of NEPA of 1969 requires that any federal agency must make detailed findings of the effect on the environment of any action significantly affecting the quality of the human environment. In particular the Act states:

> "Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—
>
> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural

and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment, and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Appendix C

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environment impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommend courses of action in any proprosal which involves unresolved conflicts concerning alternative use of available resources;

• • •

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act." 42 U.S.C. § 4332.

While it is uncontested that the application of Transco was before the FPC for consideration after the effective date of the Act, the FPC contends that the Act did not require detail findings on any environmental questions because (1) the application did not involve a "major Federal action(s) significantly affecting the quality of the

human environment * * *" as contemplated by the Act (42 U.S.C. § 4332); (2) the date of passage of the Act was not an inflexible date at which time all agencies had to immediately comply. The FPC further argues that even if findings were required, their absence in this case does not render the certificate invalid since the error would be procedural and of insufficient import to justify collateral attack upon the otherwise valid order of the FPC.

I have carefully examined the arguments before me and even though I am in sympathy with the defendants' attempts to persuade the FPC to reconsider the environmental effects of issuing this certificate, I cannot conclude that the actions of the Agency were such as to deprive it of jurisdiction to issue the certificate in question. The application was filed by Transco prior to the effective date of the NEPA of 1969 and the FPC itself did not issue regulations contemplating this type of action until December 4, 1970 (F.P.C. Docket No. R-398, Order 415, 35 Fed. Reg. 18958 [1970]). This action is consistent with Section 103 of NEPA of 1969 which allows all agencies of the government until July 1, 1971 to propose "* * * such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act." I cannot conclude as a matter of law that collateral attack is impossible once the FPC has acted, but I am persuaded in this case that the failure to act was not in violation of the NEPA of 1969. The FPC undertook to make an evaluation of the methods of compliance with the Act and there is no evidence of an abuse of discretion sufficient to permit collateral attack in this court.

In accordance with the above opinion, the motion of the HMDC for summary judgment will be denied. Counsel shall prepare an appropriate order.

LAWRENCE A. WHIPPLE
United States District Judge

APPENDIX D

Opinion of the United States District Court, District of New Jersey, September 14, 1971

CIVIL ACTION No. 980-70

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, a corporation of the State of Delaware,

Plaintiff,

v.

HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION, a public corporate body of the State of New Jersey, and CLAYSON W. FOLEY and THE BOROUGH OF CARLSTADT, a municipal corporation in the County of Bergen, State of New Jersey, and BERNARD MAGGIO,

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WHIPPLE, District Judge:

Plaintiff, Transcontinental Gas Pipe Line Corporation (Transco), seeks an injunction restraining the Hackensack Meadowlands Development Commission (HMDC), its Chief Engineer or Acting Engineer, Clayson W. Foley, its officers and agents from preventing or interfering with the construction by Transco of a proposed Liquified Natural Gas storage facility (LNG facility) in the Hackensack meadows in the Borough of Carlstadt. The complaint also seeks an order directing the Borough of Carlstadt, Ber-

nard Maggio, the Building Inspector, and any other agent, servant or employee, charged with the responsibility, to issue any permits necessary for construction of the proposed LNG storage facility.

This matter was argued by counsel before the Court without a jury. Evidence was put forth and briefs were received.

A history of the factual situation leading up to the present action is set forth in my opinion dated May 7, 1971, which denied defendant's motion for summary judgment on the counterclaim. In addition to those already set forth in my earlier opinion I make the following findings of facts:

1. On March 12, 1970 a Certificate of Public Convenience and Necessity was issued for the proposed LNG storage tank by the Federal Power Commission (FPC). Shortly afterwards the Federal Aviation Commission issued a permit approving the tanks dimensions and the Borough of Carlstadt (Carlstadt) issued a storage and building permit.

2. The HMDC within whose planning area Transco's land is located refused on June 10, 1970 to issue a construction permit to Transco unless Transco entered into a written agreement that within 10 years the entire LNG Plant, including the proposed facility, would be removed by Transco. The LNG Plant represents an approximate investment to Transco in excess of $10,000,000. Transco refused to meet the terms and the permit was denied again on July 10, 1970.

Appendix D

3. It is uncontested that the proposed facility is in conformity with all presently available building and safety codes including but not limited to those promulgated by the American Petroleum Institute (API 620, Appendix Q) and the National Fire Protection Association (NFPA 59A). In addition, various quality assurance programs, safety devices, and monitoring systems which are generally accepted in the industry as adequate safety protectors are also included in the proposals.

The plaintiff's position is relatively clear: Transco is a Natural Gas Company as defined in the Natural Gas Act, 15 U.S.C. § 717, et seq., and is vested by law with the various rights and powers provided by the Act, including the power of eminent domain. Transco has been issued a valid certificate of public convenience and necessity authorizing the construction and operation of this facility. It is further argued that both the Supremacy Clause of the United States Constitution, U. S. Const. Art. VI, and the Commerce Clause, U. S. Const. Art. 1 § 8, prohibit the HMDC from interfering in any manner with construction as authorized by the aforementioned federal legislation. In addition, it is argued that HMDC requirement that Transco abandon its facilities in 10 years would violate Section 7(b) of the Natural Gas Act which section requires FPC approval before any Natural Gas Co. can abandon its facilities.

For its part HMDC argues that the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. § 1671, et seq., did not foreclose any state attempt to set safety regulations governing natural gas facilities because this controversy arose at a point in time when the United States Department of Transportation had not yet adopted any safety stand-

ards, but had merely incorporated by reference standards already in effect in the states. (49 U.S.C. § 1672). Therefore, argue defendants, there were no pertinent federal safety standards which pre-empted the states from enacting their own. In order to fill this void HMDC hired a professional consulting service and based upon their conclusions HMDC claims that the proposed tank would create a safety hazard encompassing an area approximately one mile from the tank in all directions.

Conflicts between local regulation based upon zoning or safety ordinances and the construction by federally regulated businesses have been examined by courts in and outside this district. In *Transcontinental Gas Pipe Line Corp.* v. *Borough of Milltown,* 93 F. Supp. 283 (D. N. J. 1950) Judge Forman was faced with a problem not dissimilar from the present one. The court held that a local ordinance prohibiting construction of a pipeline authorized by the FPC was an unreasonable, arbitrary and unjustified interference with interstate commerce. The defendant argued that safety was not adequately accounted for but the court concluded otherwise. In *Algonquin Gas Transmission Co.* v. *Township of Bernards,* 112 F. Supp. 86 (D. N. J. 1953) Judge Forman reiterated his remarks concerning local zoning acting as a restriction on interstate commerce. In *Kroeger* v. *Stahl,* 148 F. Supp. 403 (D. N. J.), aff'd 248 F. 2d 121 (1957) the plaintiff was denied a zoning permit to construct a radio tower which had been approved by the Federal Communication Commission. The court found the ordinance was reasonable and not in conflict with Congressional legislation in view of the fact that alternate sites were available in a properly zoned area. Two other cases dealing with restrictions similar to the present case are *New York State Natural Gas*

Corp. v. *Town of Elma*, 182 F. Supp. 1 (W. D. N. Y. 1960) and *St. Clair* v. *Colonial Pipeline Co.*, 202 A. 2d 376 (Md. Ct. App. 1964).

An analysis of these and other cases dealing with local restrictions suggest to this Court that neither the Supremacy Clause nor the Commerce Clause rule out the authority of state or local agencies to enact reasonable laws which may provide some restrictions on the holder of a certificate of public convenience and necessity. When a conflict arises, it is incumbent upon the party seeking to avoid the restriction to demonstrate that the proposed construction is reasonably necessary at the specified site, in the proposed dimensions, that there are no alternative sites just as reasonable and that safety has been adequately accounted for in the proposal. Another factor for consideration is the time when the moving party purchased the property. Based upon an examination of these factors, it is my conclusion that Transco has adequately demonstrated that its proposed LNG storage facility is being located on a most appropriate site, that other locations are not likely to be more reasonable, and that the safety of people and property in the immediate area has been adequately accounted for.

I further find that the testimony at trial concerning the earlier events between the parties reveals that neither party was completely candid with the other. Transco for its part never notified the HMDC of its pending application before the FPC even though talks were underway between the parties. I also note that the relevant testimony of Transco's expert witness, Dr. Robert O. Parker, was never presented to the HMDC. For its part HMDC cannot escape blame although there is some understanding

by the Court due to their lack of expertise in such a complicated field. However, the burden which HMDC placed upon Transco to convince the HMDC that the project was safe without having set forth reasonable and specific standards is quite unreasonable in view of the potential conflict with a federally regulated business. It is extremely difficult to piece together at this stage just what evidence was requested or produced by request at the earlier hearings. Both parties contend now that the other was uncooperative during the hearings. I will not attempt to untangle such a disorganized series of charges because I believe the evidence presented at the trial sufficiently represents the full thrust of both parties' positions.

In the last analysis the primary issue is whether Transco adequately demonstrated that there is no safety hazard being created by this proposed facility. I find that the testimony of Transco's engineers, supervisors and expert witness has shown that the facility meets all current safety standards and, furthermore, there is no reasonable probability of a LNG spillage from the facility, and furthermore, even if such an event did occur, the configuration of the plot where the storage tank will be located is such that there is little or no likelihood that the safety of people or property in the immediate area would be endangered.

With regard to HMDC's expert testimony, I find that to a large extent it was adequately rebutted by Transco. In some areas dealing with the so-called vapor dispersion formulas, I find that HMDC's theory was based upon speculation not adequately grounded in scientific formulas applicable to LNG. (T 383-392). I also take notice of the fact of existence of several other LNG storage facilities

located in this and other countries. Under HMDC's theory of safety protection this particular plant would have to be located in the center of a piece of property of approximately four square miles. Such a parcel would be difficult, if not impossible, to purchase, but more importantly the evidence of existing or planned LNG facilities refutes the very theory the HMDC operates under. While the public is entitled to be protected from unnecessary and dangerous risks, the evidence presented in this case established no such threat. It is most appropriate that my findings and conclusions noted in this case have an apt parallel in a similar case which was decided over 20 years ago. It is always inevitable that progress of one type must be met with some compromises by those who would be ultimately served by the progress. Perhaps the words of that earlier Court would be the best summation:

> "The evidence before me is overwhelmingly in favor of the proposition that the pipe line as projected in the defendant municipality will be installed with all reasonable care for its safety in construction and operation. Similar installations practically span the country and the gas they carry is normally recognized as a necessity of life. They are a part of the modern mechanical age which particularly in this country has furnished man with the maximum ease in living in his history. Human carelessness, in the main, and mechanical defects, to some extent, are responsible for accidents which take their toll in human life and loss of property as witness the rate of fatalities, injuries and damages arising out of the use of automotive vehicles. But apparently our society is willing to pay this toll for the luxury of living it enjoys. Nothing in

this case points to the exposure of the citizens of the defendant municipality to any hazard greater than the ordinary calculated risks which have become part of the normal conditions of life in our highly mechanical age." *Transcontinental Gas Pipe Line Corp.* v. *Borough of Milltown*, supra at 291.

It is, therefore, my conclusion based upon the evidence before me that the requirements set forth by the HMDC relating to the construction of the proposed LNG storage facility are unreasonable, arbitrary and act as an unjustified interference with interstate commerce as represented here by a Natural Gas Company in possession of a certificate of public convenience and necessity. Accordingly, I find for the plaintiff and against the defendant. The relief requested in the complaint is granted, without costs.

Counsel shall prepare and submit an appropriate order in conformity with the foregoing Opinion.

LAWRENCE A. WHIPPLE
United States District Judge

APPENDIX E

Judgment

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION No. 980-70

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, a corporation of the State of Delaware,

Plaintiff,

vs.

HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION, a public corporate body of the State of New Jersey, and CLAYSON W. FOLEY and THE BOROUGH OF CARLSTADT, a municipal corporation in the County of Bergen, State of New Jersey, and BERNARD MAGGIO,

Defendants.

September 16, 1971

This matter came on for trial by the Court in the presence of David C. Schackner, Esq., appearing for Messrs. Fox, Schackner, Neagle & Mastrangelo, and Samuel C. Ratliff, Esq., Attorneys for Plaintiff; George F. Kugler, Jr., Esq., Attorney General for the State of New Jersey,

by Sherman T. Brewer, Esq., Attorney for the Defendants, Hackensack Meadowlands Commission and Clayson W. Foley; Gene N. Schiffman, Esq., appearing for Messrs. Schiffman & Schiffman, Attorneys for the Defendants, The Borough of Carlstadt and Bernard Maggio; and Herbert J. Stern, Untied States Attorney, by John W. Bissell Chief, Civil Division, and Gordon Gooch, General Counsel, and George P. Lewnes, Assistant General Counsel, by George W. McHenry, Jr., Commission Staff Counsel, Attorneys for Federal Power Commission, Amicus Curiae; Edward S. Kirby, Esq., Attorney for Plaintiff-Intervenor, Public Service Electric and Gas Co; and Robert C. Koury, Esq., appearing for Messrs. Cole, Koury, Cole & Tighe, Attorneys for Plaintiff-Intervenor, South Jersey Gas Co; and the Court having considered the pleadings, evidence and oral and written arguments of Counsel and having made findings of fact and conclusions of law, contained in its Opinions filed herein on the 7th day of May 1971, and the 14th day of September 1971;

It is ORDERED this 16th day of September, 1971, for the reasons stated in said Opinions, that Final Judgment without costs be, and it hereby is entered in favor of the Plaintiff, Transcontinental Gas Pipe Line Corp., and against the Defendants, Hackensack Meadowlands Development Commission, Clayson W. Foley, The Borough of Carlstadt and Bernard Maggio, as follows:

[a] An injunction is entered restraining Hackensack Development Commission, its Chief Engineer or Acting Chief Engineer, its officers and agents, from preventing or interfering with the construction by the Plaintiff of its proposed facility, including the 2nd above-ground container;

Appendix E

[b] An injunction is entered directing The Borough of Carlstadt, Bernard Baggio, the Building Inspector, and any other agent, servant and employee charged with the responsibility to issue any permits necessary for the construction of the proposed facility, including the 2nd above-ground container;

[c] The second defense in the Answer of the Hackensack Meadowlands Development Commission and Clayson W. Foley is stricken, and the Counterclaim is dismissed by virtue of the disposition of the Motion for Summary Judgment on these issues, as set forth in Opinion filed herein on the 7th day of May 1971, and the Order entered pursuant thereto on the 11th day of May 1971.

/s/ LAWRENCE A. WHIPPLE
D. C. J.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-665

HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION,

Petitioner,

against

TRANSCONTINENTAL GAS PIPE LINE CORP.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MEMORANDUM FOR INTERVENOR PUBLIC SERVICE ELECTRIC AND GAS COMPANY IN OPPOSITION

1. Petitioner seeks review of the Court of Appeals' Decision (Pet. App. 1a-19a) affirming the Decisions of the District Court (Pet. App. 22a-35a). The decisions below are correct and are not in conflict with any decision of this Court or any other Court of Appeals.

2. Public Service Electric and Gas Company (Public Service) is a public utility operating company engaged among other things in the purchase, manufacture and distribution of gas. It purchases natural gas from three interstate transmission pipeline companies and serves gas to over 1,270,000 customers in an area having a population in excess of 4,900,000 persons and which extends from the Hudson River opposite New York City to the Delaware River at Trenton and thence to Camden, New Jersey. Transcontinental Gas Pipe Line Corporation (Transcontinental) is a major supplier of Public Service. The record clearly established that Public Service has a critical and urgent need for this gas for its customers. Transcontinental is also presently curtailing gas supplies and is unable to meet its existing contractual commitments. The Court of Appeals took note of the needs of the New York, New Jersey metropolitan area and the fact that Transcontinental was trying to meet those needs by construction of a container for additional storage of liquefied natural gas and appurtenant facilities (Pet. App. 11a).

3. The record also reveals that Petitioner had not promulgated any set of regulations, standards, or criteria applicable to Transcontinental's type of facility (Pet. App. 11a). At the same time, Petitioner will allow a 750 acre sports complex consisting of two stadiums, a race track and various adjacent parking facilities (Pet. App. 10a). Petitioner seems to be looking for an advisory opinion but goes to great length to avoid mentioning exactly what the Court of Appeals decision says. In fact there is nothing in this case to justify an assertion that an important and novel question of federal law has to be settled. Further protracting this case will not set standards or pat-

terms in any other case. This case stands by itself. The Court of Appeals recognized the nub of this issue when it stated (Pet. App. 8a):

> "• • • We must therefore look to the particular facts presented by this case to determine whether the Commission's complete interdiction[14] of the proposed facility was a reasonable exercise of its police powers, or as the District Court determined, an 'arbitrary, unreasonable and unjustifiable interference' with interstate commerce."

The Court of Appeals treated with all of Petitioner's allegations and found them unsupported and unsubstantiated in the light of firmly established constitutional principles.

4. There is absolutely no conflict with *Calvert Cliffs Coordinating Committee, Inc. et al.* v. *Atomic Energy Commission*, 449 F. 2d 1109 (D. C. Cir. 1971). The Court of Appeals reached a completely fair and rational decision in this case and did not ignore the National Environmental Policy Act of 1969 (Act). Pertinent portions of the Act were discussed and analyzed by the Court of Appeals. (See Pet. App. 17a-18a).

5. In addition to the reasons advanced herein for denying certiorari, Public Service adopts all of the arguments which Transcontinental urges in its brief in support of the same result.

"[14] It is important to emphasize that the Commission is not attempting to require the Transco facility to conform to any specific regulation. Rather it is attempting to prohibit construction altogether."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

EDWARD S. KIRBY
JAMES R. LACEY
Attorneys for Public Service Electric and Gas Company

November 27, 1972

TABLE OF CONTENTS

	Page
Opinion Below	1
Constitutional and Statutory Provisions Involved	2
Questions Presented	3
Statement of the Case	4
A. Introduction	4
B. Factual Background	4
C. Procedural Background	7
ARGUMENT:	
I: The decision of the Third Circuit on the commerce clause issue represented a proper application of long settled constitutional principles and presents no novel question requiring resolution by this Court	9
II: There is no conflict in this case between the decision of the Third Circuit and the decisions of any other Circuit involving the construction of the National Environmental Policy Act	14
Conclusion	18
CASES CITED:	
Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (4th Cir. 1972)	17
Calvert Cliffs Coord. Com. v. United States A. E. Com'n., 449 F.2d 1109 (D.C. Cir. 1971)	14
Cooley v. Board of Wardens, 12 How. 298, 13 L.Ed. 996 (1851)	9

TABLE OF CONTENTS

Page

CASES CITED:

Frost v. Railroad Commission,
271 U.S. 583, 46 S. Ct. 605,
70 L.Ed. 1101 (1926) 12

Gibbons v. Odgen,
9 Wheat. 1, 6 L.Ed. 23 (1824) 9

Golden v. Zwickler,
394 U.S. 103, 89 S. Ct. 956 (1969) 13

Gulf Interstate Gas Co. v. Rapides Parish
Police Jury,
115 F. Supp. 746 (W.D. La. 1953) 12, 13

Local No. 8-6, Oil, Chem. & Atom Wkrs. v. Missouri,
361 U.S. 363, 80 S. Ct. 391 (1960) 14

Named Ind. Mem. of San Antonio Con. Soc. v.
Texas Hy. Dept.,
446 F.2d 1013 (5th Cir. 1971) 16

National Helium Corporation v. Morton,
455 F.2d 650 (10th Cir. 1971) 15

New York State Natural Gas Corp. v. Town of Elma,
182 F. Supp. 1 (W.D.N.Y. 1960) 12

Southern Pacific Co. v. State of Arizona,
325 U.S. 761, 65 S. Ct. 1515,
89 L.Ed. 1915 (1945) 9

Transcontinental Gas Pipe Line v. Borough
of Milltown,
93 F. Supp. 287 (D.N.J. 1950) 12

United Gas Pipeline Company v. Terrebonne
Parish Police Jury,
319 F. Supp. 1138 (E.D. La. 1970) 12

TABLE OF CONTENTS

Page

CASES CITED:

United Public Workers v. Mitchell,
330 U.S. 75, 67 S. Ct. 556 (1946) 14

Willson v. Black-Bird Creek Marsh Co.,
2 Pet. 245, 7 L.Ed. 412 (1829) 9

Upper Pecos Association v. Stans,
452 F.2d 1233 (10th Cir. 1971) 16

STATUTES CITED:

15 U.S.C.A. § 717, et seq. 4, 10

15 U.S.C. § 717(a) 1

15 U.S.C. § 717f(b) 2, 11

FEDERAL CONSTITUTION CITED:

U.S. Const. Amend. XIV § 1 1

U.S. Const. Art. I § 8, Cl. 3 1

RULE CITED:

Rule 19 ..... 13, 14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-665

HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION,

Petitioner,

vs.

TRANSCONTINENTAL GAS PIPE LINE CORP.,

Respondent,

and

PUBLIC SERVICE ELECTRIC & GAS COMPANY and SOUTH JERSEY GAS COMPANY,

Respondents-Intervenors,

and

FEDERAL POWER COMMISSION,

Amicus Curiae.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 464 F.2d 1358.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions set out in the petition for certiorari, the following constitutional and statutory provisions are also involved:

U.S. Const. Art. I § 8, Cl. 3

> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

U.S. Const. Amend. XIV § 1

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Natural Gas Act 15 U.S.C. § 717(a)

> "As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."

Natural Gas Act, 15 U.S.C. § 717f(b)

> "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such

facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

QUESTIONS PRESENTED

1. Does the attempt either to prevent the construction of an addition to an existing facility certificated by the Federal Power Commission or to permit its construction only under confiscatory and illegal conditions, constitute an undue burden on interstate commerce?

2. Can the National Environmental Policy Act (NEPA) retroactively affect a pending application for a Federal Power Commission (F.P.C.) certificate where there has been compliance with NEPA to the fullest extent possible and F.P.C. is not concerned with a major federal action but rather the expansion of an existing facility?

STATEMENT OF THE CASE

A. *Introduction*

Transcontinental Gas Pipe Line Corporation (hereinafter TRANSCO), is a Natural Gas Company as defined in the Natural Gas Act (Act) 15 *U.S.C.A.* § 717, *et seq.*, and is vested by law with the various rights and powers provided by said Act. Pursuant to Certificates of Public Convenience and Necessity issued to it by the Federal Power Commission on November 18, 1948, and from time to time thereafter, as authorized by the Act, and under the jurisdiction of the F.P.C., TRANSCO has constructed and operated an extensive pipeline system which gathers natural gas from onshore and offshore Gulf Coast locations, and transports the gas in interstate commerce for sale in various States.

Total pipeline mileage exceeds 8,000 miles, and the amount of natural gas transported annually through the system is in excess of One Trillion cubic feet. TRANSCO supplies approximately 75% of all natural gas sold by utilities in the State of New Jersey. More than One Billion Five Hundred Million Dollars has been expended by TRANSCO to date in the construction of the pipeline system, of which approximately One Hundred Forty-five Million Dollars has been expended in the State of New Jersey.

B. *Factual Background*

On February 4, 1963, TRANSCO purchased 500 acres of meadowlands in the Borough of Carlstadt (hereinafter BOROUGH) at a cost of approximately Two Million Dollars. Thereafter, it purchased from the State of New Jersey at a cost of about Four Hundred Thousand Dollars the interest which the State might have in said lands by virtue of any disputed claim of ownership as owner of the

riparian rights, and with full knowledge on the part of the State of New Jersey that TRANSCO was constructing a Liquified Natural Gas (hereinafter LNG) Plant on the premises.

The TRANSCO LNG Plant represented the largest single development in the meadowlands up to that time. It was welcomed by the municipality on the local level and hailed by the State of New Jersey as representing a substantial increase in tax ratables for the municipality and significant in the plans of the State for development of the meadowlands.

The surrounding area was then and still is barren and completely undeveloped. The selection of this site followed extensive feasibility studies as to location along the pipeline with due regard to sound engineering practice and reasonable necessity for an LNG Plant as a part of the interstate natural gas system of TRANSCO.

Application for the construction and operation of an LNG Plant and the rendition of LNG service in interstate commerce was made to the Federal Power Commission. After holding the public hearing required by the Natural Gas Act, and based upon the application and all Exhibits appended thereto, the F.P.C. issued a Certificate of Public Convenience and Necessity on July 3, 1963, authorizing the construction and operation of the LNG facilities with an in-ground container and the rendition of LNG service in interstate commerce. The in-ground container did not, however, accommodate storage of the full quantity of LNG for which it was designed. TRANSCO accordingly applied to F.P.C. and was authorized by appropriate Certificate to construct and operate an above-ground container in substitution for the in-ground container designed to hold the same liquid capacity as the original unit. Building permits and permits for the storage of LNG were issued by the BOROUGH, pursuant to Local Ordinance No. 560.

The Federal Aviation Administration similarly issued a permit approving the above-ground container.

In the fall of 1969, TRANSCO was advised by a number of its customers that substantial additional LNG service was required by them in order to meet the urgent requirements of the markets they serve (including housing projects, schools, hospitals, churches, hotels, office buildings and other institutions).

TRANSCO accordingly applied to the Federal Power Commission in December of 1969 for a second above-ground container at the LNG Plant site, of substantially the same size and construction. The largest distributor of natural gas in the State of New Jersey, Public Service Electric and Gas Company, as well as a number of other gas distribution utilities, filed Petitions to Intervene in that proceeding, as well as in the action *sub judice*, supporting the application and pointing out the urgent need for the facility, as well as the acute supply requirements and concern for the safety of the public which prompted their action.

F.P.C. on March 12, 1970, issued a Certificate of Public Convenience and Necessity for a second above-ground container and the rendition of the additional LNG service. This was followed by issuance of permits by the Federal Aviation Administration and a storage permit by the BOROUGH for the storage of LNG with the building permit to issue upon authorization of the container by the Defendant, Hackensack Meadowlands Development Commission (hereinafter H.M.D.C.).

H.M.D.C. was created pursuant to the Hackensack Meadowlands Reclamation and Development Act in the State of New Jersey which was approved on January 13, 1969. The TRANSCO LNG Plant is physically within the district established by the Act.

Long prior to that date and commencing in the year 1950, TRANSCO, pursuant to Certificates of Public Convenience and Necessity duly issued by the F.P.C. constructed in the meadowlands within the boundaries of said district, as an integral part of its system for the transmission and sale for resale in interstate commerce of natural gas, approximately 35 miles of pipeline with all necessary appurtenances, such as meter and regulator stations, block and tap valves. Easements were purchased from the property owners whose lands were crossed. Expenditures for land use and construction exceeded Ten Million Dollars.

It is pertinent to state that as of now, the LNG Plant represents a Multi-Million Dollar investment on the part of TRANSCO.

C. *Procedural Background*

While TRANSCO asserts that H.M.D.C. has no authority over the construction and operation of the second above-ground container, it did in a spirit of cooperation, in this instance as in all situations involving local authorities, meet with their representatives, furnish voluminous information and material requested and make their personnel, including high level corporate officers and the chief engineer for the project, available to answer all inquiries. Despite all of the foregoing, and though it had neither regulations, standards nor criteria applicable to the facility sought, H.M.D.C. refused permission for TRANSCO to proceed. Nevertheless, by Resolution adopted on June 10, 1970 (Pet. App. 6a), H.M.D.C. offered to reconsider such denial, if TRANSCO would accede to extremely onerous conditions, including but not limited to, an absolute agreement to abandon the LNG Plant without compensation and contrary to the mandate of the Natural Gas Act and the rules and regulations of F.P.C. prohibiting such abandonment and consequent cessation of service to TRANSCO customers and the public.

This suit was accordingly instituted, alleging that the actions of H.M.D.C. constituted a prohibited interference with the regulation of interstate commerce and was causing the public and plaintiff irreparable injury and loss. An injunction was sought restraining H.M.D.C. from interfering with the installations and operations of TRANSCO.

A national shortage of natural gas has existed and become increasingly more acute since this action was instituted. Currently, TRANSCO and many other transmission companies have curtailed delivery below the level of service which they had heretofore rendered. Requests from potential customers for additional gas service have been turned down because TRANSCO and other suppliers have been unable to purchase sufficient additional quantities of gas in the producing fields to meet the increased demand. This public energy shortage, which is expected to become even more critical, is a matter of common knowledge.

The defendants never filed a trial brief, although they were furnished with trial briefs by the other parties to the action on or before the date fixed by the court. After an extended trial during which many witnesses testified at some length, final judgment was entered on September 16, 1971 for this respondent.

TRANSCO, in an effort to adhere to a construction schedule which would enable it to complete the project to serve the critical needs of customers, has committed itself to a contract at a total cost in excess of Four Million Dollars of which it has paid, as of November 2, 1972, approximately 60%, or more than Two and One-half Million Dollars. Three separate applications for an injunction pending appeal were unsuccessfully prosecuted by the petitioner before the trial court and the Third Circuit Court.

ARGUMENT

I

The decision of the Third Circuit on the commerce clause issue represented a proper application of long settled constitutional principles and presents no novel question requiring resolution by this Court.

One of the basic issues presented by this case is the extent to which a State may interfere with interstate commerce. It is an issue almost as old as the Constitution itself and was dealt with in some of the earliest landmark decisions of this Court. *Gibbons v. Odgen*, 9 Wheat. 1, 6 L. Ed. 23 (1824); *Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412 (1829) and *Cooley v. Board of Wardens*, 12 How. 298, 13 L. Ed. 996 (1851).

The decision of this Court in *Southern Pacific Co. v. State of Arizona*, 325 U.S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945), cited and relied upon by the Third Circuit, sets out clearly and in detail the relevant constitutional principles. Holding that the exercise of police power in the enactment of zoning ordinances (as urged by petitioner here)would be struck down where the necessary effect would be to place a substantial burden on interstate commerce, this Court went on to say:

> "But ever since *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." (at p. 767).

The issue was framed as follows:

> "The decisive question is whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on the interstate train journey which it interrupts." (at pp. 775-776).

This Court concluded that the Arizona statute constituted an undue burden on interstate commerce:

> "The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation *is not to be avoided by 'simply invoking the* convenient apologetics of the police power.'" 325 U.S. at 779, citing *Kansas City Southern R.Co. v. Kaw Valley District*, 233 U.S. 75, 79 (1914) (emphasis added).

Southern Pacific applies with equal force to the case *sub judice* and conclusively demonstrates the propriety of the finding of the District Court that the petitioner's action unduly burdened interstate commerce and the affirmance by the Circuit Court of that ruling. Congress in enacting the *Natural Gas Act*, 15 U.S.C. 171 *et seq.* clearly asserted the need for "uniformity of regulation" of the transportation and sale of natural gas in interstate commerce by stating in the very first section thereof that:

> "• • • it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."

The action of the petitioner substantially affected the flow of interstate commerce in the transportation and sale of natural gas and served to deprive that commerce of the uniformity of regulation sought by Congress. Petitioner attempted to do something far more radical than simply regulate the LNG facility which had been certificated by the F.P.C. Rather, it attempted to exclude that facility entirely or, in the alternative, to permit construction on conditions which were not only onerous and confiscatory, but also in violation of the express prohibition contained in 15 U.S.C. § 717f(b), which provides in pertinent part as follows:

> "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, * * *."

To permit such action, would leave every other State similarly free to exclude facilities employed in interstate commerce or to condition their construction on equally burdensome terms. Such a result would totally frustrate the congressional purpose embodied in the Natural Gas Act. It would completely dam the flow of interstate commerce and make a mockery of the pattern of uniformity which the federal legislation in this area seeks to achieve.

Finally, the record below incontrovertibly demonstrated the absence of any justification for so extraordinary a burden on interstate commerce. The principal thrust of petitioner's case was a claim that the proposed facility constituted a safety hazard. Respondent controverted that claim by a formidable array of expert witnesses. The District Court rejected the claim. On appeal petitioner again challenged the finding of the trial court on this point and asserted the District Court failed to give sufficient consideration to the alleged benefit that would result from

the implementation of its zoning scheme. The Circuit Court rejected both contentions. Since petitioner does not challenge their rejection here, it obviously concedes there was adequate support in the record for the finding that its attempt to exclude the facility constituted an undue burden on interstate commerce and the local concerns which petitioner sought to foster did not outweigh that burden. Indeed, on the record, no other conclusion could realistically have been reached. Other cases have reached the same result in very similar factual settings. *Gulf Interstate Gas Co. v. Rapides Parish Police Jury,* 115 F. Supp. 746 (W.D. La. 1953); *Transcontinental Gas Pipe Line v. Borough of Milltown,* 93 F. Supp. 287 (D.N.J. 1950); *New York State Natural Gas Corp. v. Town of Elma,* 182 F. Supp. 1 (W.D.N.Y. 1960).

The conditions which petitioner imposed for permission to construct the LNG facility violated not only the Natural Gas Act but also served to deprive respondent of its property without due process of law. In *Frost v. Railroad Commission,* 271 U.S. 583, 46 S. Ct. 605, 70 L. Ed. 1101 (1926) this Court struck down a California statute which imposed as a condition to the granting of a permit to a private carrier for the use of its highways the assumption by the applicant of the duties and burdens of a common carrier. In reaching this result this Court said:

> ". . . We hold that the act under review, as applied by the court below, violates the rights of plaintiffs in error as guaranteed by the due process clause of the Fourteenth Amendment, and that the privilege of using the public highways of California in the performance of their contract is not and cannot be affected by the unconstitutional condition imposed . . ." (271 U.S. at p. 599).

The *Frost* case was relied upon in *United Gas Pipeline Company v. Terrebonne Parish Police Jury,* 319 F. Supp. 1138 (E.D. La. 1970). A natural gas company

subject to the jurisdiction of the F.P.C. applied to the local body for permission to construct a portion of its interstate pipeline under a road in the parish. Permission was conditioned, *inter alia*, upon the company's agreeing to alter, relocate or remove the pipeline at its own expense if the pipeline or any portion interfered with any future public improvement in the parish. The Court held this condition "would result in the taking of the Pipeline Company's property without the payment of just compensation in violation of the due process clause of the Fourteenth Amendment." (319 F. Supp. at p. 1143). *Accord, Gulf Interstate Gas Company v. Rapides Parish Police Jury*, 115 F. Supp. 746 (W.D. La. 1953).

In an effort to bring itself within the ambit of *U.S. Sup. Ct. Rule* 19, 28 *U.S.C.A.* petitioner argues there are no adequate guide lines for enacting zoning laws which may regulate interstate commerce facilities certificated by the F.P.C. The argument is wholly specious. By particularizing the issue in this fashion petitioner endeavors to obscure the real and basic issue: the extent of the power of a state to affect interstate commerce. There is an abundance of long standing precedent of this Court to guide the lower federal courts and the state courts in resolving issues such as the one posed by this case. This argument pursued to its logical conclusion, would require this Court to grant certiorari to review every case involving a state statute or municipal ordinance which in any way affected interstate commerce unless there was a decision of this Court dealing specifically with the same facts.

To state the position of the petitioner in yet another way, it seeks the advisory opinion of this Court on its zoning scheme. As is well known, this Court and all Federal Courts established pursuant to Article III of the Constitution do not render advisory opinions. *Golden v. Zwickler*, 394 U.S. 103, 89 S. Ct. 956 (1969); *United Pub-*

lic Workers v. Mitchell, 330 U.S. 75, 67 S. Ct. 556 (1946); *Local No. 8-6, Oil, Chem. & Atom. Wkrs. v. Missouri*, 361 U.S. 363, 80 S. Ct. 391 (1960).

The argument is untenable and without merit.

II

There is no conflict in this case between the decision of the Third Circuit and the decisions of any other Circuit involving the construction of the National Environmental Policy Act.

Straining to bring itself within the purview of *U.S. Sup. Ct. Rule* 19, 28 *U.S.C.A.* petitioner further asserts a conflict between the decision by the Third Circuit in the case *sub judice* and the decisions by other Circuits. The alleged conflict is completely illusory and non-existent.

The Third Circuit Court determined that on the facts in this case, the Federal Power Commission reasonably concluded, in the absence of any guidelines, that the issuance of a certificate to expand an existing LNG facility which involved neither the expenditure of public funds nor the taking of public lands, was not an "action" within the meaning of § 102 of NEPA. This ruling is clearly and readily distinguishable from those in the other Circuit Court cases cited by petitioner.

Calvert Cliffs' Coord. Com. v. United States A. E. Com'n., 449 F.2d 1109 (D.C. Cir. 1971) involved a challenge to rules formulated by the Atomic Energy Commission in purported compliance with the requirements of NEPA. In a lengthy opinion the Court reviewed and analyzed the rules and found they violated NEPA, and virtually made that act a nullity so far as the Commission was concerned. The Court made the following observations:

> "In the cases before us now, we do not have to review a particular decision by the Atomic Energy Commission granting a construction permit or an operating license. Rather, we must review the Commission's recently promulgated rules which govern consideration of environmental values in *all* such individual decisions. The rules were devised strictly in order to comply with the NEPA procedural requirements—but petitioners argue that they fall far short of the congressional mandate." (449 F.2d at pp. 1115-1116), (emphasis supplied).

Further on:

> "The Act, it is true, lacks an 'inflexible timetable' for its implementation." (449 F.2d at p. 1119).

And again:

> "No doubt the process formulating procedural rules to implement NEPA takes some time. Congress cannot have expected that federal agencies would immediately begin considering environmental issues on January 1, 1970." (449 F.2d at p. 1120).

Clearly *Calvert Cliffs'* is in accord, rather than conflict, with the instant case, which is concerned with the expansion of an existing LNG facility certificated prior to the issuance of any guidelines as to what constituted federal action, rather than a direct attack upon rules adopted in compliance with NEPA.

National Helium Corporation v. Morton, 455 F.2d 650 (10th Cir. 1971) involved the Helium Act which empowers the Secretary of the Interior to make contracts of no more than twenty-five years duration for the "acquisition, processing, transportation or conservation" of helium. On January 25, 1971—over a year after NEPA became effective—the Secretary notified certain corporations producing helium for the United States, pursuant to the Act,

that their contracts were being cancelled as of the following March 27th on the basis that there was a sufficient supply of helium on hand to last until 1995. The helium producers sued the Secretary, contending, *inter alia*, that if they were not permitted to extract helium from natural gas prior to its delivery to the consumer the gas would be ventilated into the atmsophere and lost when the natural gas was consumed as fuel. In holding that the Secretary had to comply with NEPA, the Court said:

> "The Secretary in the instant case proposes to take an action which has environmental consequences, namely, rapid depletion of the helium resources of the country." (455 F.2d at p. 658).

Morton is thus, both legally and factually different, from this case.

The remaining three Circuit Court cases cited by petitioner involved highway construction and are likewise readily distinguishable. *Named Ind. Mem. of San Antonio Con. Soc. v. Texas Hy. Dept.*, 446 F.2d 1013 (5th Cir. 1971) dealt with the construction of a six to eight lane highway from the San Antonio Airport to the downtown sections of that city. The federal government was to pay half of the cost of the project. The Court held NEPA applied and said:

> "Without belaboring the point, we conclude that we have no difficulty in characterizing a project of this size as 'major.'" (446 F.2d at p. 1025).

Upper Pecos Association v. Stans, 452 F.2d 1233 (10th Cir. 1971) involved a grant of funds from the Economic Development Administration to the Board of Commissioners of a county in New Mexico equal to eighty percent of the cost of construction of twenty-six miles of new

road and the resurfacing of seven and one-half miles of existing road. In holding NEPA applicable to this project, the Court said:

> "A reading of the record reveals that the parties are in agreement that the proposed road is 'a major federal action' within the meaning of § 102(C) of the N.E.P.A." (452 F.2d at p. 1235).

Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (4th Cir. 1972) involved that part of an interstate highway running through Arlington County, Virginia, most of the cost of which was to be paid by the federal government. The Court quite properly ruled NEPA applied, and said:

> "It is undisputed that prior to the filing of this suit no Section 102(C) statement had been prepared for the project in question. It is also uncontested that this six-to-eight-lane highway is a 'major federal action significantly affecting the quality of the human environment.'" (458 F.2d at p. 1330).

The last three cited cases were either stipulated to be or found to be, "major federal actions," within the meaning of NEPA. All three involved *new* highways and the expenditure of substantial federal funds for their construction. All of them, as well as *Calvert Cliffs'* and *Morton*, mounted a direct attack against the federal agency or department involved, which in each instance was a party to the litigation. Here there is only the expansion of the storage capacity of a facility, which long ante-dated NEPA, is situate in a remote and unimproved area, and which, as the Third Circuit carefully noted, involved neither the expenditure of federal funds, nor the taking of public lands.

Respondent respectfully submits that this aspect of the petition for certiorari, as urged by the petitioner, is unsubstantial and has no basis in either fact or law.

CONCLUSION

The contentions raised in the petition were carefully reviewed and properly rejected by the Court below. The applicable Constitutional principles have been long settled and there is no conflict between the decision below and any decision of this Court, or any other court of appeals. Petitioner in effect seeks an advisory opinion which neither this Court nor any other federal court will render. Respondent, Transcontinental Gas Pipe Line Corporation, therefore, respectfully submits that further review by this Court is not warranted and the petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-665

HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION, PETITIONER

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported in 464 F.2d 1358. The opinions of the district court (Pet. App. C and D) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on August 2, 1972. The petition for a writ of certiorari was filed on October 30, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the actions of the Hackensack Meadowlands Development Commission, in attempting to prohibit the construction of a liquified natural gas storage facility certificated by the Federal Power Commission, constituted an impermissible interference with interstate commerce.

2. Whether a certificate of public convenience and necessity issued by the Federal Power Commission pursuant to Section 7 of the Natural Gas Act, 15 U.S.C. 717f, is subject to collateral attack on the ground that the Commission failed to prepare an environmental impact statement.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 15 U.S.C. 717 *et seq.*, and of the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, are set forth at pp. 3-5 of the petition.

STATEMENT

1. Transcontinental Gas Pipe Line Corporation ("Transco") owns and operates an extensive interstate pipeline system for the transportation of natural gas. In February 1963, Transco purchased 500 acres of meadowlands from the Borough of Carlstadt, New Jersey, on which to construct facilities for the processing and storage of liquified natural gas ("LNG") (Pet. App. 3a). Pursuant to certificates of public convenience and necessity issued by the Federal Power Commission under Section 7 of the Natural Gas Act, 15 U.S.C. 717f, and building and storage permits issued by the Borough of Carlstadt, Transco constructed,

first, processing and underground storage facilities and, later, an above-ground storage container. These facilities are currently in operation (*ibid.*).

In the fall of 1969, Transco was advised by its customers that they would require additional LNG service during the winter of 1971-1972. To meet the additional needs, Transco applied to the Commission on December 17, 1969, for authorization to construct and operate a second above-ground storage container. Notice of the application was duly published, 35 Fed. Reg. 343,[1] and numerous customers of Transco intervened in support of the proposal. On March 12, 1970, the Commission issued a certificate authorizing construction of the second above-ground container (Pet. App. 5a).[2]

Prior to Transco's filing of the application for the second above-ground container, the Hackensack Meadowlands Reclamation and Development Act (N.J.S.A. 13:17-1 *et seq.*) was passed by the State of New Jersey and approved as law on January 13, 1969. Pursuant to the Act, the Hackensack Meadowlands Development Commission ("HMDC") was created with the power and responsibility to prepare, adopt, and implement a master plan for the development of all lands lying within the Hackensack Meadowlands District. The Act also provides that a permit should be obtained from

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[1] In addition to public notice, special notice was given to the governor and the Public Service Commission of the State of New Jersey.

[2] Appropriate permits for the second above-ground container were issued to Transco by the Borough of Carlstadt and the Federal Aviation Administration.

HMDC prior to the commencement of any construction on any land covered by a master plan. Transco applied to the HMDC for a building permit for its proposed facility, but HMDC refused to issue a permit on the ground that the construction and operation of the LNG facilities is not a permitted use under its master plan (Pet. App. 5a-6a).[5]

2. Upon the denial of a permit by HMDC, Transco brought this action in the United States District Court for the District of New Jersey seeking an order restraining HMDC from interfering with the construction or operation of the second above-ground container, or, alternatively, requiring HMDC to issue the appropriate permits. Transco alleged that HMDC's failure to permit the construction constituted an unlawful interference with interstate commerce. HMDC denied the allegations of the complaint and counterclaimed to enjoin Transco from commencing construction of the certificated project. HMDC's subsequent motion for summary judgment on the ground that the certificate under which Transco sought to construct the proposed facility was void since the Commission had not complied with the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. 4321 *et seq.*, was denied (Pet. App. 22a-27a).

After an evidentiary hearing on the merits of the complaint and counterclaim, the district court found in favor of Transco and issued an injunction prohibiting HMDC from interfering with the certificated con-

[5] The portion of the master plan allegedly inconsistent with Transco's project was adopted by HMDC *subsequent* to the issuance of a certificate by the Commission.

struction. The court found that "the requirements set forth by the HMDC relating to the construction of the proposed LNG storage facility are unreasonable, arbitrary, and act as an unjustified interference with interstate commerce as represented here by a Natural Gas Company in possession of a certificate of public convenience and necessity" (Pet. App. 35a).

On appeal, the court of appeals noted that it was required to "look to the particular facts presented by this case to determine whether the [Meadowlands] Commission's complete interdiction of the proposed facility was a reasonable exercise of its police powers, or as the District Court determined, an 'arbitrary, unreasonable and unjustifiable interference' with interstate commerce" (Pet. App. 8a). After reviewing the particular facts, including the needs of the New York-New Jersey metropolitan area for an adequate gas supply, the court of appeals upheld the district court's conclusion that HMDC had unjustifiably interfered with interstate commerce (Pet. App. 7a-13a). The court also held that the Federal Power Commission, in issuing Transco a certificate for the second above-ground storage container, was not required to issue an environmental impact statement under Section 102 of NEPA (Pet. App. 14a-19a).[4]

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[4] As the court of appeals noted (Pet. App. 17a-18a), Transco's application was filed with the Commission prior to the effective date of NEPA and the certificate was issued only two and one-half months after the effective date. The Interim Guidelines of the Council on Environmental Quality, interpreting the Act, were not issued until April 30, 1970 (35 Fed. Reg. 7390)—more than one month after the certificate was issued.

INTEREST OF THE FEDERAL POWER COMMISSION

The Federal Power Commission is charged with the responsibility of administering the Natural Gas Act, 15 U.S.C. 717 *et seq.* In granting Transco a certificate under Section 7 of the Act to construct a second above-ground LNG storage container, the Commission necessarily concluded that the construction of the container was in the public interest. In defending Transco's suit, petitioner seeks to block construction of the container and, to that end, collaterally attacks the Commission's order issuing the certificate. The Commission participated as *amicus curiae* in the courts below and is participating in this Court to defend its order and to urge that petitioner not be permitted to interfere with the construction of the above-ground container.

ARGUMENT

The decision of the court below, which essentially turns on the facts of this particular case, is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioner contends that "existing precedents leave substantially unsettled questions as to what extent and in what degree local governmental authorities are empowered to exercise their authority over activities certificated under the Natural Gas Act" (Pet. 10). The law regarding the extent of permissible local authority, however, is well settled and was correctly summarized in the court of appeals' opinion (Pet. App. 7a-8a):

> It is well established that the interstate transmission and sale of natural gas is within the

> regulatory ambit of the Commerce Clause of the Constitution. *Commonwealth of Pennsylvania* v. *State of West Virginia*, 262 U.S. 253 (1950); *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575 (1942). Although the states are not precluded from imposing reasonable restraints and restrictions on interstate commerce, and although the authority to enact zoning ordinances under the state's police power is clear, see, *e.g.*, *Village of Euclid Ohio* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), it is equally settled that a state may not exercise that police power where the necessary effect would be to place a substantial burden on interstate commerce. *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945). [Footnote omitted.]

The courts below correctly applied these familiar principles to the facts of this case and properly concluded that the actions of HMDC unreasonably interfered with interstate commerce. Without invoking any specific regulation of its own, HMDC seeks through this litigation to prohibit the construction of certificated facilities which are undeniably part of Transco's interstate operations and which are necessary to meet the pipeline's commitment to provide its New York-New Jersey customers with an adequate gas supply. Under all the circumstances, including the fact that the initial LNG processing and storage facilities were constructed prior to the establishment of HMDC, HMDC's conduct exceeds the permissible bounds of local police power. See *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 779.

2. Petitioner asserts (Pet. 11-14) that the Federal Power Commission failed to comply with NEPA in issuing a certificate for the storage facility and that the decision below upholding the Commission's action is in conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission*, 449 F.2d 1109. Petitioner, however, did not intervene in the certificate proceedings before the Commission and did not seek direct judicial review of the Commission's order issuing the certificate. Since the Commission in issuing the certificate was clearly acting within its jurisdiction under Section 7 of the Natural Gas Act, its order is not now subject to collateral attack by petitioner. See *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525; *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U.S. 117.

In any event, the decision below that the Commission in the particular circumstances of this case was not required to file an environmental impact statement is correct and does not conflict with the decision in *Calvert Cliffs*. To begin with, NEPA requires a detailed environmental impact statement *only* in "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). In the present case, unlike *Calvert Cliffs*, the court of appeals was unable to find that a "major Federal action" was involved (see Pet. App. 18a). Second, the court of appeals noted that in cases such as this one involving a Commission order issued only two and one-half months after the effective date of NEPA, "a flexible approach to NEPA should be taken" (Pet.

App. 17a). In *Calvert Cliffs*, the District of Columbia Circuit acknowledged that NEPA does not impose an "inflexible timetable" (449 F.2d at 1119) and stated:

> No doubt the process formulating procedural rules to implement NEPA takes some time. Congress cannot have expected that federal agencies would immediately begin considering environmental issues on January 1, 1970. [*Id.* at 1120.]

Finally, *Calvert Cliffs* involved a rulemaking proceeding rather than the issuance of a particular certificate, as here. In *Calvert Cliffs*, the court of appeals expressly noted that "we do not have to review a particular decision by the Atomic Energy Commission granting a construction permit or an operating license." 449 F.2d at 1115-1116.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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